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No. 86-1863

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FINANCIAL INFORMATION, INC.,

Petitioner.

– against –

MOODY'S INVESTORS SERVICE,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

INTRODUCTION 1

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE PETITION PRESENTS IMPORTANT QUESTIONS OF LAW, E.G., THE STANDARDS FOR PROTECTION NOT NARROW ISSUES OF FACT 3

II. THE EXHIBITS, WITHOUT REFERENCE TO TESTIMONY, SHOW ORIGINALITY: THE FII CARDS WERE NOT JUST COPIED FROM SOURCE 8

III. THE PROPER TEST, REJECTED BELOW, IS "CONTRIBUTION," NOT "EFFORTS" 15

CONCLUSION 19

TABLE OF AUTHORITIES

CASES

Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903) 12

Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1984) 9

Congressional Committee v. Legi-Tech Corp., 795 F.2d 190 (D.C. Cir. 1986) 7

Eckes v. Card Prices Update, 736 F.2d 859 (2d Cir. 1984) 15

Editorial Photocolor Archives, Inc. v. Granger Collection, 61 N.Y.2d 517, N.E.2d 365, N.Y.S.2d 964 (1984) . . 4

Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985) . 3, 4

Kitchens of Sara Lee Inc. v. Nifty Foods Corp., 266 F.2d 541 (2d Cir. 1959) . 12

National Business Lists, Inc. v. Dun & Bradstreet, Inc., 552 F. Supp. 89 (N.D. Ill. 1982) 16

Oboler v. Goldin, 714 F.2d 211 (2d Cir. 1983) 4

PIC Design Corp. v. Sterling Precision Corp., 231 F. Supp. 106 (S.D.N.Y. 1964) 13

Rand McNally & Co. v. Fleet Management Systems, Inc., 634 F. Supp. 604 (N.D. Ill. 1986) 8

Ricker v. General Electric, 162 F.2d 141 (2d Cir. 1947) 13

Rockford Map Publishers v. Directory Service Co. of Colorado, Inc., 768 F.2d 145 (7th Cir. 1985) . 8, 11, 14, 16, 18

Salinger v. Random House, Inc., 811 F.2d 90 (2d Cir. 1987) 6

Sherry Mfg. Co. v. Towel King of Florida, Inc., 753 F.2d 1565 (11th Cir. 1985) 7, 9

Southern Bell Telephone and Telegraph Co. v. Associated Telephone Directory Publishers, 756 F.2d 801, (11th Cir. 1985) 8

OTHER

1 Nimmer on Copyright 2.01[B] 13

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PETITIONER'S REPLY BRIEF

INTRODUCTION

This is not a credibility case. All the essential facts are documentary and undisputed, presenting the fundamental and important question of law in dispute: whether the Law of Copyright will fulfill its promise of protecting authors of compilations against substantial, indeed massive copying, or will betray its promise by imposing unduly high barriers to protectability.

The Second Circuit's special and "particularly restrictive" standard [1] conflicts with the teachings of this Court and the holdings in other Circuits, presenting this Court with an issue of law, not a narrow factual dispute. Review is sought for fundamental legal questions, not credibility issues. Review is sought merely to give a remedy for a wrong, the proper purpose of the law.

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[1] Moody's argues that any list, no matter how clear or obvious, would be a copyrightable compilation under FII's theory (RB 34). Moody's attacks a straw man. The Court is dealing here with copying in the 40-50% range (C 40) which the Second Circuit characterized as "substantial" and perhaps wholesale (C 38). It is dealing with copying which is so massive as to go beyond the limits of excusable fair use. It is dealing with copying for which there is no public policy justification whatsoever, as Moody's itself admits that it is readily able to produce its own called bond service without copying from FII. Granting FII a remedy would in no way monopolize public domain facts or overextend copyright protection.

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE PETITION PRESENTS IMPORTANT QUESTIONS OF LAW, E.G., THE STANDARDS FOR PROTECTION, NOT NARROW ISSUES OF FACT

Respondent Moody's would have the Court believe that the case has no general significance and FII lost because its witnesses lied. [2]

But the issue is not credibility, it is that the Second Circuit is not in

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[2] While obviously we submit that Ms. Zawilski spoke the truth, our petition for certiorari in no way depends on such factual issues. Assuming Ms. Zawilski lied, or even that there were no witnesses, this Court can look at the source material and the cards (See Point II below and the "Lodging" submitted herewith) to see selection, coordination or arrangement. This Court can decide for itself whether the test for copyrightability should not be unduly raised. It can decide for itself, even assuming all credibility issues in Moody's favor, that the Second Circuit has once again (see Harper & Row) imposed excessive, incorrect standards on protectability, excessively favored infringers and thereby severely damaged the rights and incentives of first authors.

accord with a so-called "broad consensus" (Respondent's Brief, hereinafter "RB" at 45) of other Circuits; this Circuit proudly confesses its own restrictiveness (Petitioner's Main Brief, "PB" at 10, n.2) and has previously been reversed by this Court for its excessive and studious inattention to the rights of creators and protection of their creations. Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 545-46 (1985) ("Second Circuit gave insufficient deference" to Copyright's incentives for authors).

For the purposes of deciding whether or not to grant certiorari [3], this

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[3] We continue also to urge review on misappropriation; the cases simply do not support FII-5's view that such claims are preempted or inapplicable here. See Oboler v. Goldin, 714 F.2d 211 (2d Cir. 1983) (use of radio plays -- not hot news); Editorial Photocolor Archives, Inc. v. Granger Collection, 61 N.Y.2d 517, 463 N.E.2d 365, 474 N.Y.S.2d 964 (1984) reproduction of photographs

Court need not decide whether Petitioner's or Respondent's arguments are correct, or whether the Second Circuit or Seventh Circuit test for copyrightability more closely approaches the intentions of the Constitution and the Copyright Act; only that these matters are matters of importance, meriting this Court's review.

The questions Petitioner presented for review -- e.g., whether data based factual compilations should be held to a particularly restrictive standard of copyright -- are not questions of fact, but are questions of law, appropriate for this Court's review. /[4] The Second

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-- not hot news).

[4] Apart from the copyrightability of the individual cards, there is also an important question as to whether copyrightability should be considered on the basis of a year's output or some smaller units, such as monthly, weekly, daily or individual cards. Any compil-

Circuit's "particularly restrictive" standard and denial of copyright protection to works of non-fiction has been expressly and repeatedly stated in the past two decades (PB 10, 30). /[5] This raises the fundamental issue of the

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ation sufficiently dissected can be deemed uncopyrightable since individual facts can never be protected by the copyright law. Thus, while a phone book is copyrightable, an individual entry is not. Is the law to permit wholesale copying if done for years on a piecemeal basis? Modern data bases can be updated daily, hourly or even by the minute or second. Is the entire data base denied protection because each individual component can be stolen, piece by piece, and the pieces may not be readily copyrightable?

[5] The Second Circuit's hostility toward factual works is not disproved, as Moody's argues (RB 41), by the recent Salinger v. Random House, Inc., 811 F.2d 90 (2d Cir. 1987), as Moody's counsel should know better than anyone: at issue were unpublished letters of a renouned author of fiction, not a history book or compilation.

standard by which copyrightability is determined, a clear question of law. /[6]

Petitioner seeks review of this "particularly restrictive" Second Circuit standard. This excessive standard directly affects the copyrightability of data based compilations in the Second, and other, Circuits; conflicts with the principles taught by this Court; conflicts with the history and purpose of the Copyright Clause of the Constitution; and conflicts directly with the holdings of many other circuits (as so stated by the D.C. Court of Appeals in Congressional Committee v. Legi-Tech Corp., 795 F.2d 190, 194 (D.C.

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[6] Even if a particular work's copyrightability under the correct standard may be itself a question of fact; but see Sherry Mfg., infra at 9.

Cir. 1986) (PB 29). /[7] There is dispute, not consensus, in the circuits.

II. THE EXHIBITS, WITHOUT REFERENCE TO TESTIMONY, SHOW ORIGINALITY: THE FII CARDS WERE NOT JUST COPIED FROM SOURCE

Copyrightability of compilations can often be based on documentary evidence: look at the source and then look at the differences /[8] in the resulting work

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[7] See also Southern Bell Telephone and Telegraph Co. v. Associated Telephone Director Publishers, 756 F.2d 801, 810 (11th Cir. 1985) (noting conflict in standards for "originality" and viability of misappropriation theory); Rand McNally & Co. v. Fleet Management Systems, Inc., 634 F. Supp. 604 (N.D. Ill. 1986) (analyzing Rockford Map and noting "restrictive standard" in Second Circuit).

[8] Moody's suggested that FII would have to make up or create facts, not simply extract them from public domain sources, in order to create a copyrightable compilation (RB 20). Even the slightest analysis demonstrates that this assertion makes no sense. Both phone books and maps are two classic compilations which are clearly copyrightable. Neither is a work of

presented for copyright protection (see "Lodging": samples of sources and FII cards). This Court has held that the presumption of correctness that attaches to factual findings has less force when applied "to findings based on documentary evidence". Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 at 500 (1984); see Sherry Mfg. Co. v. Towel King of Florida, Inc., 753 F.2d 1565, 1569, note 6 (11th Cir. 1985) (contrary to Moody's (RB 28-29), appeals court examined differences in designs to decide originality and copyrightability as a matter of law). This Court can see for itself the transformation that takes place from the tombstone or other sources.

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fiction; in neither would one find made up towns, rivers, names or addresses.

Moody's has supplied the Court with a blank FII card which, like the blanks in a crossword puzzle or an LSAT test, require intelligence and judgment to fill in correctly. The samples of source material (see "Lodging") show a host of numbers, dates, names, etc. FII must select from all of these which dates, numbers and words correctly correspond to the categories it has chosen to report, and then arrange the chosen information. /[9]

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[9] Notice that there are eleven (11) dates on the Hatfield/Montgomery source (E4); FII had to select which of these were the correct dates for bond series, due date and redemption date--a judgment it initially made incorrectly (compare corrected card of August 28 to original card of August 6, page E-1). Errors of judgment, we submit, show per se that judgments are involved.

The combining of different sources (E12 and 13; E66-69) into one FII card (E9; E62), shows coordination of underlying, public domain facts. The added information (entire address on E-22 and "Terminal Annex Station" on E-23) not present on the source material

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(E26-27), shows additional FII "coordination" through cross-reference and address files.

It is undisputed that FII has changed and reconsidered its selection of which areas of information were sufficiently "critical" -- in its own subjective business judgment -- to belong in the FII cards. Over the years, FII stopped reporting on when interest was payable and past calls, and added "CUSIP" numbers.

FII chooses to include the redemption price, even though this information is not needed by the holder of the bond in order to redeem. FII chooses to omit the total value of the call, total number of bonds called, trustee name, source identification, presentation method, sinking fund information and whether the bond is registered, even though this information has uses to subscribers and, indeed, some was included by some competitors.

We do not claim this is a work of genius, but rather that such mundane works are important in their own way, and deserve the minimal protection against massive -- near 50% -- copying (of expression, not idea) that many other Circuits would grant (see PB 21). As Rockford Map Publishers v. Directory Service Co. of Colorado, Inc., 768 F.2d 145 (7th Cir. 1985), teaches, smaller contributions should not be denigrated and ignored, but rather protected to a lesser extent (PB 35).

FII's cards are thus not simply functionally dictated, but reflect choices and judgments as to several matters, unlike the ingredients list in Kitchens of Sara Lee Inc. v. Nifty Foods Corp., 266 F.2d 541 (2d Cir. 1959) (list functionally dictated by food inside package). Although FII does not claim to be a "work of genius," some human intelligence and judgment is needed; a child, robot or fool would do it wrong. [10] It is on this precise issue we

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[10] We think it reprehensible that the District Court found it significant that one of FII's workers had but a mere high school education (B 8). Can only college graduates or Ph.D.'s create compilations? As Justice Holmes warned in a related context, it is a "dangerous undertaking for persons trained only to the law to constitute themselves judges of the worth" of commercial works, "outside of the narrowest and most obvious limits." The worth of plaintiff's work "is sufficiently shown by the desire to reproduce them without regard to plaintiff's rights." Bleis-

seek review by this Court: availability vs. denial of protection for works which do not display inventive genius, but mere "originality" in the sense of differing from, not merely copying, source material (see PB 24-25).

Contrary to Moody's suggestion, FII in no way claims protection for the facts themselves. /[11] Subscribers are unquestionably permitted to use those

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tein v. Donaldson Lithographing Co., 188 U.S. 239, 250 (1903), quoted at 1 Nimmer on Copyright 2.01[B] at 12.

[11] Moody's citations (RB 38) in fact support FII. In Ricker v. General Electric, 162 F.2d 141, 142 (2d Cir. 1947), the "sole issue" was infringement, not copyrightability; the court agreed the work was protectable but not copied. So too in PIC Design Corp. v. Sterling Precision Corp., 231 F. Supp. 106, 110-11 (S.D.N.Y. 1964), the table of "14 figures" was not plaintiff's work, but the court's listing of drawings that were copied; the court only questioned whether infringement was shown by similarities resulting from the same facts; however, the appearance of the same errors did show copying.

facts to redeem their bonds, and competitors who subscribe to FII (as Moody's used to) are perfectly entitled to check their own called bond services against FII, to increase accuracy and completeness. Indeed, FII did so use its rivals, the publications from Moody's and Standard & Poors. Such a "check" use has long been understood as proper, whereas mere copying is not. Rockford Map at 149. Moody's attempt to confuse its copying and FII's checking, and obscure the check-copy distinction, strikes at the heart of compilation law. /12

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12 Moody's correctly notes that FII knew for many years that Moody's was a subscriber (RB 25); FII had assumed that Moody's also was checking, not copying, a perfectly permissible use by a rival. There was no knowledge, much less acquiesence, in Moody's extensive copying. When this was discovered, suit was promptly brought.

III. THE PROPER TEST, REJECTED BELOW, IS "CONTRIBUTION," NOT "EFFORTS"

Moody's continues its argument, accepted in FII-5 and FII-4, that FII exercises too little effort (RB 21) in creating the cards. This standard, adopted by the decision below [13] reflects basic, legal error. The Seventh Circuit had previously rationalized extending copyrightability by saying that effort, hard work, sweat of the brow should be enough to create copyright protection even if it was difficult for judges to delineate

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[13] Although the Second Circuit paid lip service to the correct test ("results not efforts" at A 7), it did not use this test, deciding on the basis that FII's "efforts" were much less than those of the Ph.D. in Eckes v. Card Prices Update, 736 F.2d 859 (2d Cir. 1984). Thus the Second Circuit thought that the "crucial issue on remand involved FII's efforts," and that too "little" independent creation was involved (A 3, 8).

selection, coordination or arrangement. /[14] But until FII-5, no Circuit had ever said that a lack of hard effort denies copyrightability. As Rockford Map /[15] makes clear, copyrightable works can be created in a lifetime or in a moment (768 F.2d at 148).

Moody's argues the absence of disagreement among the circuits (RB 44); we disagree. While the Seventh Circuit has made an effort towards harmoni-

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[14] The courts in that Circuit had even done so to protect compilations of Moody's parent, National Business Lists, Inc. v. Dun & Bradstreet, Inc., 552 F. Supp. 89 (N.D. Ill. 1982).

[15] The Rockford Map rationale (standard for copyrightability is low, but protection is proportional to amount of original contribution) protects the fundamental incentives for first authors necessary to copyright law. There remain inherent safeguards to protect subsequent authors and the public, once copyrightability is established -- e.g., fair use and the "substantial similarity" tests.

zation, by abandoning the "sweat of the brow" theory, the Second Circuit has stood that theory on its head and used a concept intended to extend protection as an excuse to deny protection for lack of perceiving sufficient labor. /[16] Labor should not be the test to either grant or deny protection, and the Second Circuit's use of a reverse labor theory is precisely the legal error requiring review and reversal. At present, minimal judgment, such that a high

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[16] A photographer can point his camera to a landscape, shoot a picture in a second -- or even set the automatic timer and throw the camera into the air and have no control at all as to when the picture is taken -- and create a copyrightable work. A painter could throw a can of paint (or paint-coated worms) against a canvas, and create a work which is copyrightable. These creations can require no "effort" (and perhaps no judgment and intelligence) whatsoever, yet the works -- even if only 4" x 6" -- are copyrightable. The correct issue for judges is not "how much work," but "is there some contribution?"

school student is capable of, is not sufficient in the Second Circuit to justify protection -- and this is a bad law (supra at 12).

There should not have to be huge amounts of judgment or intelligence displayed in the work in order for there to be copyrightability. Even small contributions should be protected; they receive less protection but they should receive some protection [17]. That protection is all that FII has ever asked; it is that protection that it

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[17] The key teaching of Rockford Map, which the Second Circuit obviously disagrees with, is that there does not have to be a great deal of selection, coordination or arrangement; and this was the key for that court finding irrelevant defendant's argument that too little effort was required to make Rockford's work (768 F.2d at 248). If the contribution ("expression") is rudimentary, protection per Rockford Map will be minimal, requiring more substantial similarity of expression, not merely the similarity that is functionally dictated or required by the facts -- as there was here.

would have received in the other circuits; and it is that protection which it has been denied in the Second Circuit.

Contrary to Moody's arguments, FII is only looking for protection of the expression of facts, not the facts themselves (see RB 43, 44). But here there was such extensive similarity of expression, copying proven beyond the limits of tolerable fair use. /[18]

CONCLUSION

On its face, FII's case may carry no glamour, not having the memoirs of an

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[18] Moody's asserts that there has never been a finding that it engaged in extensive copying (RB 24), ignoring the Second Circuit's reversal (FII-3) based on "substantial if not wholesale copying" (C 38) as shown by the extensive reproduction of errors. Moody's would have this Court believe that only the errors were copied, offering (RB 24) this Court non-nonsensical statistical proofs properly excluded from the record.

ex-president, or the entire video cassette recorder (VCR) industry at stake. But beneath the fact of a small company massively copied by a large competitor, and beneath the injustice in denying any remedy for that wrong, lies an issue worthy of this Court's attention: the protectability of factual compilations (e.g., maps, directories, phone books and computer data bases). Creation of these works of non-fiction, both old and new, is important in our society, deserving of the protection of Copyright, and ought not to find the promise of protectability a false one.

Respectfully submitted,

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